MSS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 46 OF 1996

SHIVAJI MAHIPATI TANUGADE)
R/o Padali Khurd, Tal. Karveer)
Dist. Kolhapur.) APPELLANT
(Org. Complainant)

VERSUS

1.BABASAHEB MAHADEO @ MADHAVRAO)
R/o 142, E-Ward, Sadarbazar)
Kolhapur)
4. THE STATE OF MAHARASHTRA) RESPONDENTS

Mr. Ganesh Bhujbal, Advocate appointed as Amicus Curie for appellant

Mr. M. R. Deshpande, Advocate appointed for R-1

Smt. V. R. Bhosale, APP

CORAM: **SMT. RANJANA DESAI, J.**

DATE: SEPTEMBER 26, 2007.

ORAL JUDGMENT:

. The appellant is the original complainant in Regular Criminal Case No. 155/1991, which was tried in the court of the 7th Joint Judicial

Magistrate First Class, Kolhapur at Kolhapur. Respondent 1 is the original accused. He was tried for the offences punishable under Section 138 of the Negotiable Instruments Act and under Section 420 of the Indian Penal Code. For the sake of convenience I shall refer the appellant as "the complainant" and the 1st respondent as "the accused".

2. The case of the complainant as disclosed in the complaint and in his evidence is that he is the permanent resident of village Padali Khurd. He is an agriculturist. The accused is working in the Social Welfare Department. The accused and the complainant were friends.

3. On 26/3/89 the complainant went to the house of the accused. The accused was in need of Rs.7000/-. He requested the complainant to pay the said amount to him. The accused promised to repay the said amount within one month. The complainant told him that he will bring the said amount from his brother. The complainant then went to his brother and brought Rs.7000/- from him. On the same day at about 3-30 he went to the house of the accused. At that time the accused and his friend one Bandopant

D. Thipkurle were present in the house. The complainant paid Rs.7000/- to the accused. As the relations between the complainant and the accused were friendly, they did not execute any document about the said transaction.

4. It is the case of the complainant that the accused did not repay the said amount within a month as promised though several demands were made by him. At last on 27/10/90 the complainant went to the house of the accused in the morning and insisted upon the repayment of the said money. At that time the accused gave him a cheque drawn on the State Bank of India, Gargoti Branch, bearing No. A/29-808515 in the sum of Rs.7000/-. The said cheque was drawn in favour of the complainant. The complainant presented the said cheque to the Kolhapur Urban Co-operative Bank, Head Office, Kolhapur in October 1990 and thereafter on 7/11/90 and again on 7/12/90. However, on all these occasions as there was no sufficient balance in the account of the accused, the cheque was dishonoured. The complainant then issued notice to the accused dated 20/12/90 by registered post through his advocate. The accused received the notice on 21/12/90, however, the accused did not repay the

amount. The complainant, therefore, filed the instant complaint praying that the accused be punished in accordance with law.

5. In support of his case, the complainant examined himself before charge. He also examined his brother Madhukar. Charge was framed against the accused. The accused pleaded not guilty to the charge and claimed to be tried. The accused did not lead any evidence. In his statement recorded under Section 313 of the Code of Criminal Procedure, the accused stated that he was falsely implicated in the case as there was enmity between him and Thipkurle. He further stated that the complainant used to come to his father for his work. His father did not do the work therefore, the complainant has filed false case against him at the instance of Thipkurle.

6. After perusing the evidence on record the learned Magistrate was inter alia of the view that the complainant had failed to prove that cheque dated 27/10/90 was issued by the accused in discharge of the whole or the part of the debt or liability. He, therefore, acquitted the accused. The said judgment and order is challenged in this

appeal by the complainant.

7. I have heard at some length Mr. Bhujbal, learned amicus curie appearing for the complainant. He submitted that the learned Magistrate has wrongly held that the complainant had failed to prove that the cheque was issued by the accused in discharge of whole or part of the debt or liability. He submitted that the complainant has examined himself. He has also examined his brother. The evidence of these two witnesses clearly establishes that the accused was in need of money and the complainant had paid him the amount. It is further established that the cheque in question was issued by the accused in discharge of the said liability. Mr. Bhujbal contended that the learned Magistrate failed to note the significance of Section 139 of the Negotiable Instruments Act which contains a presumption in favour of the holder of a cheque. He submitted that the accused has not been able to rebut the said presumption and, therefore, the learned Magistrate ought to have convicted him.

8. In support of his submission he relied on the judgment of the Supreme Court in **Hiten P. Dalal v.**

Bratindranath Banerjee, (2001) 6 S C C 216. He also relied on judgment of the Supreme Court in **Central Bank of India & Anr. v. Saxons Farms & Ors., (1999) 8 S C C 221**.

9. The learned counsel further submitted that the learned Magistrate erred in coming to a conclusion that the complainant had failed to prove that he gave notice to the accused demanding payment within 15 days of his receiving information of dishonour for insufficiency of funds. He submitted that the learned Magistrate misconstrued Section 138 (c) of the Negotiable Instruments Act. He submitted that the cheque has to be presented within six months from the date of the cheque. It is open to the holder of the cheque to present the cheque repeatedly within the period of six months. The period of notice contemplated under Section 138(c) starts running from the date when he receives information disclosing insufficiency of funds. But once the notice is given by the holder, he cannot create a fresh cause of action. The cheque cannot be presented again once the notice is given. In this case, since the cheque was presented again on 7/12/90 and the complainant issued notice to the accused on 20/12/90, the notice is well within the

period of 15 days from the date of presentation of the cheque on 7/12/90. He submitted that, therefore, the learned Magistrate was wrong in coming to a conclusion that the complainant had failed to prove that he gave notice to the accused demanding payment within 15 days of his receiving information of dishonour for "insufficiency of funds". Mr. Bhujbal contended that, therefore, the impugned judgment and order be set aside and the accused be convicted in accordance with law.

10. Mr. Deshpande, the learned amicus curie appearing for the 1st respondent submitted that the learned Magistrate has rightly acquitted the accused as the complainant has failed to prove that the cheque was issued in discharge of whole or part of debt or liability. He submitted that the view taken by the learned Magistrate is a reasonably possible view and it does not deserve to be disturbed in this appeal against acquittal.

11. Before I deal with the merits of the case, it is necessary to bear in mind that this is an appeal against an order of acquittal. It is well settled that, if the view taken by the trial court is a rerasonably possible view and the judgment of the

trial court is not perverse, the superior court should not interfere with it in an appeal against acquittal by substituting its own view for it. In **State of Rajasthan v. Raja Ram, (2003) 8 SCC 180**, while dealing with an appeal against acquittal, the Supreme Court has observed that generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The Supreme Court has further observed that the golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The Supreme Court has further clarified that the principle to be followed by the appellate court while considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference not otherwise. Keeping these principles in mind, I will approach the present appeal.

12. The complainant has stated that on 26/3/89 the accused requested for Rs.7000/- from him to get over his personal difficulties. According to him thereafter he went to village Padali to meet his brother. He told his brother that the accused was in need of Rs.7,000/-. He took Rs.7000/- from his brother and on the same day he went to the house of the accused. One Mr. Thipkurle was in his house. Complainant paid Rs.7000/- to the accused on the condition that the accused returns the amount within a month. It is necessary to test whether this story is acceptable.

13. It is pertinent to note that though in the court the complainant has deposed that the accused had requested for an amount of Rs.5000/- and he had collected Rs.5,000/- from his elder brother and paid it to the accused. In the complaint he has stated that the accused had asked for Rs.7,000/-. It is not clear, therefore, whether the accused in fact advanced Rs.7,000/- or Rs.5,000/-. A serious doubt is created about the exact loan amount. Therefore, it is not understood as to in discharge of which liability cheque dated 27/10/90 was issued. There is a great discrepancy in the complaint which is the foundation of this case and

the deposition of the complainant in the court. The complainant has examined his brother, but he has not examined Thipkurle who could have been an independent witness to depose about the transaction.

14. For presumption under Section 139 of the Negotiable Instruments Act to arise, the complainant must first of all make out a case that the cheque was issued by the accused in discharge of whole or part of a debt or liability. A debt or liability has to be established beyond doubt. There should be no ambiguity or confusion about debt or liability.

15. In **Hiten Dalal's case (supra)** on which reliance is placed by Mr. Bhujbal, the Supreme Court has considered the nature of the presumption under Section 139 of the Negotiable Instruments Act. The Supreme Court has held that such a presumption can be rebutted by the drawer by proving by leading evidence that the holder of the cheque had not received the same towards the discharge of any liability and such rebuttal does not have to be conclusively established. The court must either believe the defence to exist or

consider its existence to be reasonably probable.

16. No doubt it is held that it is obligatory on the court to presume the liability of the drawer for the amount of the cheque in every case but the Supreme Court has clarified that presumption will arise only where the factual basis for such presumption is established. In this case the factual basis itself is not established and, therefore, there is no question of the accused leading evidence to rebut the same. There is a serious discrepancy in the case of the complainant which goes to the root of the matter.

17. In the aforestated circumstances, in my opinion, the view taken by the learned Magistrate is a reasonably possible view which does not deserve to be disturbed in this appeal against acquittal. It is, therefore, not necessary for me to examine the other contentions raised by Mr. Bhujbal.

18. In the view that I have taken there is no substance in the appeal. Appeal is, therefore, dismissed.

JUDGE.

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VERSUS

BABASAHEB MAHADEO @
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Mr. Ganesh Bhujbal, Advocate appointed as Amicus Curie for appellant

Mr. M. R. Deshpande, Advocate appointed for R-1 as amicus curie

Smt. V. R. Bhosale, APP

CORAM: **SMT. RANJANA DESAI,J.**

DATE: SEPTEMBER 26, 2007.

OPERATIVE PART OF THE ORDER

. For the reasons stated in the oral judgment, this court has dismissed the appeal.

JUDGE.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 46 OF 1996

DATE OF DECISION:26/9/2007

Submitted for approval.

THE HON'BLE (SMT.) JUSTICE RANJANA DESAI:

THE HON'BLE SHRI JUSTICE :

1. Whether Reporters of Local Papers be allowed to see the Judgment?)
2. To be referred to the Reporters or not?)
3. Whether Their Lordships wish to see the fair copy of the Judgment?)
4. Whether this case involves a)

substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?)

5. Whether it is to be circulated to the Civil Judges?)

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur, Aurangabad and Goa Offices?)